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In the

Supreme Court of the United States

OCTOBER TERM, 1992

DONALD NEAL RAKE, ET AL.,
Petitioners,
v.
WILLIAM J. WADE, TRUSTEE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Motion for Leave to File Brief Amicus Curiae and Brief of Consumer Education and Protective Association, Dunella M. Wesby, Marie R. Allard, and Chapter 13 Trustees Gary Gaertner and Edward Sparkman, as Amici Curiae in Support of Petitioners

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124 Cong. Rec. S177406 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S. Code Cong. & Admin. News 6505, 6550 52

Report of the Bankruptcy Laws Commission, Part II, H.R. Doc. No. 137, 93rd Cong., 1st Sess. 204-06 (1973), reprinted in Appendix 2, Collier on Bankruptcy (1992) 49, 50, 51

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Consumer Education Protective Association (CEPA), Dunella M. Wesby, Marie Allard and Chapter 13 Standing Trustees Gary J. Gaertner (for the Western District of Pennsylvania) and Edward Sparkman (for the Eastern District of Pennsylvania) hereby respectfully move for leave to file the following joint brief amicus curiae in this case. The consent of David A. Carpenter, attorney for the petitioner, has been obtained. The consent of Lawrence A. G. Johnson, attorney for the respondent, was requested and refused.

The interests of the amici are set forth in the brief in a separate section entitled "Interest of Amici Curiae," which section is incorporated by this reference.

This brief will assist the Court in resolving this case. It extends petitioner's "plain meaning" argument to a complete analysis of the words contained in 11 U.S.C. § 1322(b)(5). It contrasts § 1322(b)(5) with other chapter 13 payment provisions which, unlike § 1322(b)(5), do expressly provide for interest. Further, this brief goes beyond petitioner's argument to place § 1322(b)(5) into context within the overall scheme of Chapter 13 of the Bankruptcy Code and within the legislative history which produced it. Finally, this brief discusses the impact of this Court's decision in United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988) on the statutory interpretation required in this case.

Amici believe that the brief they request permission to file contains a more

complete argument of the position supporting reversal of the Court of Appeals. If amici's argument are accepted, they would be dispositive of the case.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Amicus Consumer Education and Protective Association, Inc. (CEPA) is a membership organization of primarily low-income consumers based in Pennsylvania. CEPA is dedicated to advancing the cause of consumer rights, and in particular, the support and protection of those statutory remedies designed to enable economically distressed homeowners the opportunity to save their homes from foreclosure. Principal among these remedies is, of course, chapter 13 of the Bankruptcy Code which has enabled hundreds of CEPA's members to address the burden of their debt, including, most critically, the opportunity to set up affordable payment plans for curing defaults on their home mortgages.

CEPA's particular interest in this case is two-fold. First, a decision

requiring chapter 13 "cure" plans to pay present value interest on arrears would substantially increase the burden that chapter 13 places on low-income debtors and, in many cases, would put this remedy beyond the reach of homeowners who, but for the added payment requirement, could save their home. Second, since Pennsylvania homeowners have a state law right to cure mortgage defaults without payment of interest on the amount in default, see Pa. Stat. Ann. tit. 41, § 404 (Purdon 1992), such a decision would increase the cost for Pennsylvania homeowners to cure a default under chapter 13 by providing a windfall to mortgage lenders. Both results, CEPA believes, would be contrary to the intent underlying the chapter 13 remedy.

Amici Dunella M. Wesby and Marie R. Allard are individuals who have filed

bankruptcy cases under chapter 13 of the Bankruptcy Code in the Eastern District of Pennsylvania and the District of Massachusetts respectively. Their bankruptcy plans provide for cure of defaults on their existing home mortgages pursuant to 11 U.S.C. § 1322(b)(5). Because of their low fixed incomes, a requirement of payment of interest on the arrears due under their mortgage could prevent them from curing their defaults in bankruptcy. Ms. Wesby and her four children could lose their home of 14 years. Ms. Allard, an elderly individual, could lose her home of 48 years.

Amici Gary Gaertner and Edward Sparkman are Chapter 13 Standing Trustees in the bankruptcy courts for, respectively, the Western District and Eastern District of Pennsylvania. They have the statutory duty to review and

administer chapter 13 plans and represent the interest of the bankruptcy estate. A decision requiring payment of interest on arrears in plans curing mortgage defaults could, in some cases, substantially increase the payments required to be made to secured creditors at the expense of unsecured creditors and would, they believe, undermine the delicate balance of creditor rights that exists under chapter 13.

SUMMARY OF THE ARGUMENT

The petitioner chapter 13 debtors proposed to cure their respective mortgage defaults under 11 U.S.C. § 1322(b)(5) by paying all amounts owing under their mortgage contracts over the life of their plans, while maintaining current payments on the mortgages. The cure amounts include back payments of interest and principal, late penalties and other

default charges, as provided by the respective contracts. The Court of Appeals for the Tenth Circuit ruled that these payments were insufficient on the ground that the Bankruptcy Code creates a federal right to interest on all amounts needed to effect a cure under the contract between the parties, even though state law would not require the payment of such interest.

The lower court reached this result by equating the payment of an arrearage on a debt being reinstated with the payment of the full balance of a debt, i.e., the entire claim. Then, having equated the arrearage with the creditor's "allowed secured claim," the court held that 11 U.S.C. § 506(b), as construed in United States v. Ron Pair Enters., Inc., 489 U.S. 235, 109 S.Ct. 1026 (1989) requires the debtors to pay interest on interest, on

late penalties and on the other components of the arrearage.

The reasoning of the court of appeals, which rejected the decisions of four other circuits, is at odds with the plain meaning of § 1322(b)(5). Unlike other payment provisions in the Bankruptcy Code, this section does not require chapter 13 debtors to pay compensation over and above the amount needed to cure a default. Instead, § 1322(b)(5) requires only that the cure be effected "within a reasonable time." In contrast, another "cure" provision in the Code, 11 U.S.C. § 365(b)(1), expressly requires payment of interest.

Moreover, the overall scheme of Chapter 13, as well as its underlying purposes and history, reveal a clear Congressional intent to treat the curing of a default on a long term debt in a

conceptually distinct way from the payment and discharge of the "allowed secured claim." Section 506(b), as construed by Ron Pair, concerns the evaluation of the "claim," not an arrearage on the claim. The Code's use of interest as a way of compensating creditors for the delay in payment caused by bankruptcy comes from the chapter 13 "cramdown" provision, 11 U.S.C. § 1325(a)(5), which applies to claims, not arrearages on claims. Unlike "claims" which are discharged or paid in full in a chapter 13 case, debts treated under §1322(b)(5) are not discharged and the contract between the parties survives the bankruptcy. 11 U.S.C. § 1328(a)(1).

As this Court held in United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988), the delicate balance struck by Congress regarding the relative rights of creditors

should not tampered with by statutory interpretations which, in attempting to protect secured creditors, depart from the words of the statute and the scheme Congress has adopted. The asserted right to "interest on arrears" is not in the statute, nor would the inference of such a right be consistent with the text, the purpose or the history of the Bankruptcy Code. Adoption of the Tenth Circuit's holding would create an unintended economic benefit for secured creditors at the expense of unsecured creditors.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE PERMITS CHAPTER 13 DEBTORS TO CURE DEFAULTS ON LONG TERM DEBT WITHOUT HAVING TO PAY "INTEREST ON ARREARS"

A. This Court's Inquiry Need Go No Further Than an Examination of the Plain Language of the Code.

Section 1322(b)(5) of the Bankruptcy Code[1] provides that a chapter 13 plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending" on long term debt. At issue in this case is whether a chapter 13 debtor who is curing a home mortgage default over the duration of his or her plan is required by the Bankruptcy Code to compensate an oversecured mortgagee for the time delay in receiving the funds needed to cure.

[1] 11 U.S.C. § 1322(b)(5).

In more practical terms, the question is whether, in addition to the monthly installments of principal and interest, late charges, costs, and other default penalties provided by the mortgage contract (all amounts hereinafter referred to collectively as "the arrearage"), a debtor must also pay "present value" interest[2] on the total arrearage in order to effect a cure of a pre-bankruptcy default pursuant to 11 U.S.C. § 1325(b)(5).

As in all cases of statutory construction, the starting point in this

[2] The term "present value interest" is derived from 11 U.S.C. § 1325(a)(5)(B)(ii) and is used colloquially by bankruptcy practitioners to refer to the additional sums which must be made to render a bankruptcy plan's stream of payments on an allowed secured claim equal to "the value, as of the effective date of the plan" of the allowed claim.

case must be statutory language itself.[3] "[T]he strong presumption [is] that Congress expresses its intent through the language it chooses." Immigration and Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987).

This is especially true in the bankruptcy context. Congress worked on the formulation of the Bankruptcy Code for nearly a decade. The Code was established to modernize the bankruptcy laws and as a result made major changes in the substantive laws of bankruptcy, particular regarding the treatment of secured claims. United States v. Ron Pair Enters., Inc.,

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[3] Toibb v. Radloff, 501 U.S. ____, 111 S. Ct. 2197 (1991); Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 110 S. Ct. 2126, 2130 (1990); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 109 S. Ct. 1026, 1030 (1989).

489 U.S. 235, 240, 109 S. Ct. 1026, 1030 (1989). As this Court stated in Ron Pair,

> In such a substantive overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain meaning of the statute.

Ron Pair, 489 U.S. at 240, 109 S. Ct. at 1030.

Thus, the starting point in interpreting the chapter 13 right to cure must be the language of § 1322(b)(5) itself. To the extent that provision is subject to alternative interpretations, one must look to the statutory scheme as a whole in order to determine the meaning Congress intended when it chose particular language. As observed in United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988), a bankruptcy case which, like this one,

involved a secured creditor's assertion under the Code of an entitlement to "present value" payments:

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme--because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

484 U.S. at 371 (citations omitted).

In this case, the plain language of the Code, viewed as a whole, is clear. The ordinary meaning of "curing a default" as well as the absence of any reference to "interest" or "value" in § 1322(b)(5) precludes the "interest on arrears" position adopted by the Tenth Circuit.

The significance of the absence of any reference to "interest" or "present value" in § 1322(b)(5) is buttressed by other provisions in the Code which permit

a debtor to make payments as a means of adjusting a debtor-creditor relationship in which there was a prepetition default. In contrast to § 1322(b)(5), these other Code provisions[4] explicitly impose some additional payment obligations on a debtor wishing to invoke a particular Code remedy following a prepetition default in payments to a creditor.[5]

Not only is there no textual basis for a requiring the payment of interest under § 1322(b)(5), but the overall scheme for treating secured debt in chapter 13 proceedings mandates a rejection of the Tenth Circuit's holding. As recognized by four courts of appeals,[6] the Bankruptcy

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[4] 11 U.S.C. §§ 365(b)(1), 1124(2), 1129(b)(2)(A)(i)(II), 1325(a)(5)(B)(ii).

[5] See Part I.C.2, at p. 27, infra.

[6] In re Laguna, 944 F.2d 542 (9th Cir. 1991); Landmark Financial Services v. Hall, 918 F.2d 1150 (4th Cir. 1990);

Code reveals an unambiguous distinction between, on the one hand, curing a default on a secured claim which survives a discharge from, on the other, paying off and discharging a secured claim under the plan.

When a cure is effectuated, the prepetition contract is reinstated and remains in force following the bankruptcy pursuant to 11 U.S.C. § 1328(a)(1). When a claim is paid off, the contract, the personal obligation and the security interest are discharged by payment. Only in the latter situation is the secured creditor entitled to receive "present value" of the amount to be paid by the debtor in the plan. Those Code provisions which deal with the valuation and payment

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Appeal of Capps, 836 F.2d 773 (3rd Cir. 1987) In re Terry, 780 F.2d 894 (11th Cir. 1985). See also 5 Collier on Bankruptcy ¶1322.09[4] (15th ed. 1992).

of "secured claims," §§ 506 and 1325(a), are not authority for requiring chapter 13 debtors to pay present value on plan payments which are made not for the purpose of paying the "claim," but instead, are made for the purpose of reinstating an obligation in default.

B. In § 1322(b)(5) Congress Gave Chapter 13 Debtors the Power to Remedy Defaults in Accordance With Their Contractual Obligations.

Although "curing a default" is not defined in the Code, this phrase certainly has a generally accepted usage within the language of debtor-creditor relationships, which should be applied in construing 11 U.S.C. § 1322(b)(5).[7] This common meaning

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[7] "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979); accord, Mills Music, Inc. v. Snyder, 469 U.S.

was explored extensively by the Seventh Circuit in In re Clark, 738 F.2d 869, 872 (7th Cir. 1984):

> Absent a persuasive reason to the contrary, we are to attribute to the words of a statute their common meaning. (citations omitted) The common meaning of "cure" is to remedy, restore, remove, or rectify, see Webster's Third International Dictionary 555 (1971), and as the term relates to defaults, "cure" means to restore matters to the status quo ante. See, e.g., Jack LaLanne Biltmore Health Spa, Inc. v. Builtland Partners, 99 A.D.2d 705, 471 N.Y.S.2d 854, 856 (1984) (default on lease); Carolina Commercial Bank v. Allendale Furniture Co., 280 S.C. 247, 312 S.E.2d 559, 571-72 (1984) (default on mortgage loan); Chesterton State Bank v. Coffey, 454 N.E.2d 1233, 1237 (Ind.App. 1983) (using cure in the sense of "remedy"); Federal National Mortgage Association v. Bryant, 62 Ill.App.3d 25,28, 18 Ill.Dec. 869, 378 N.E.2d 333,336 (1978) (mortgage). Ordinarily, the means by which one cures a default is by paying all amounts due and owing; however, "cure" is the end, not the means, and what the term refers to is the restoration of the way things were before the default.

738 F.2d at 872.

A cure of a default has several consequences. First, the phrase clearly includes a concept of deacceleration and delayed performance. To cure a default means to remedy the event which triggered the default (generally, the nonpayment of amounts due under the relevant contract) through a subsequent performance, to nullify the contractual consequence of the nonpayment (generally, acceleration of the entire principal balance), and to return the debtor and creditor to their pre-default circumstances. See, e.g., In re Taddeo, 685 F.2d 24, 26-27 (2d Cir. 1982). Second, it is the contract being cured which defines what performance must be done in order to effectuate the cure. As observed by the Third Circuit:

153, 164 (1985); Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984).

> Cure by its very nature assumes a regime where debtors reinstate defaulted debt contracts in accordance with the conditions of their contracts. Usually the terms for cure are provided in the contracts themselves.

Appeal of Capps, 836 F.2d 773, 777 (3d Cir. 1987).

In summary, the function of a cure is simply to enable the debtor to remedy a failure to perform under a contractual obligation. Therefore, in the absence of some overriding federal interest statutorily expressed by Congress in the text of the Bankruptcy Code, it is the contract itself and applicable nonbankruptcy law[8] which must define the

[8] For example, in Pennsylvania there is a statutory right to cure a default on a residential mortgage obligation and the amount needed to cure is fixed by this statute. Pa. Stat. Ann. tit. 41, § 404 (Purdon 1992). Similarly, a number of states have enacted the 1974 Uniform Consumer Credit Code which contains a right to cure various secured consumer credit contracts in §5.111. That

performance necessary to effect a cure of a prepetition default under 11 U.S.C. § 1325(b)(5). See Butner v. United States, 440 U.S. 48, 55 (1978) (absent express provisions in federal bankruptcy law, the nature and extent of property rights in the assets of the debtor's estate are left to state law).

C. Unlike Other Payment Provisions in the Code, § 1322(b)(5) Does Not Contain a Requirement That Chapter 13 Debtors Pay Compensation Over and Above the Amount Needed to Cure a

section then specifies the requirements of a cure.

To the extent a claim for interest on an arrearage encompasses a claim for interest on unpaid interest (compound interest), there is an extensive body of state law which would prohibit such claim. See Landmark Financial Services v. Hall, 918 F.2d at 1155-56; In re Manville Forest Products, Inc., 43 B.R. 293, 300 n.6 (Bankr. S.D.N.Y. 1984). Creditors typically liquidate the damage accruing by virtue of late payments by imposing "late charges" under the contract. A creditor would receive a windfall if it obtained interest on late charges included as an element of the arrears.

Default, But Instead Requires Only That the Cure Be Accomplished "Within A Reasonable Time".

In this case, the bankruptcy court confirmed a plan which proposed to cure the default on the debtor's home mortgage obligation by paying all the missed payments, plus all other default charges imposed by the mortgage contract. Among the default charges were late fees and interest on insurance advancements made by the mortgagee. 968 F.2d at 1037 & n.4. The district court affirmed the bankruptcy court order.

In its decision reversing the lower courts, the Court of Appeals ruled that the Bankruptcy Code, not the mortgage contract, entitled the mortgagee to interest on the entire cure amount being paid, not just on the insurance advancements, as the contract provided. Thus, according to the Court of Appeals,

the Bankruptcy Code required payment of interest on the missed payments--which themselves include interest--and on late fees.

As the Court of Appeals acknowledged, this result was clearly not grounded in the text of the Code's chapter 13 cure provision itself. Section 1322(b)(5) contains no language that debtors must pay this additional interest amount. Congress did use conditioning language, but only that cure take place "within a reasonable time," and that such cure be accompanied simultaneously with "maintenance of payments while the case is pending." 11 U.S.C. § 1322(b)(5). See Landmark Financial Services v. Hall, 918 F.2d 1150, 1153 (4th Cir. 1990).

1. The "reasonable time" condition of § 1322(b)(5) is inconsistent with a "present value" requirement.

The conscious rejection by Congress of some notion of present value compensation in § 1322(b)(5) is inherent in the requirement that cures be accomplished "within a reasonable time." Present value interest is a compensatory device designed to nullify the effect of a time delay in the payment of money. It makes little sense to conceive of a stream of present value payments as being limited to "a reasonable time," given that the whole purpose of present value is to compensate the creditor fully for the economic loss caused by the passage of time. The only sensible interpretation is to conclude that Congress chose to condition chapter 13 cures with the

"reasonable time" requirement instead of a present value requirement.

2. The Code states explicitly when interest must be paid to pay an allowed claim in full.

The absence of additional qualifying language in § 1322(b)(5) requiring the payment of interest on delinquent installment payments necessarily manifests Congress' decision not to require the payment of interest on arrears. This conclusion is supported by an examination of other Code provisions which involve payment to creditors.

In chapter 13, § 1325(a)(5) explicitly requires that a debtor who wishes to "provide for" (i.e., satisfy) an allowed secured claim, pay the present value of the claim as of the effective

date of the plan.[9] The same requirement is explicit in chapter 11 when a debtor seeks confirmation of a plan without the acceptance of a secured class by virtue of § 1129(b)(2)(A)(i).[10] If Congress had

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[9] Section 1325(a)(5) provides that the court shall confirm a chapter 13 plan if, inter alia:

> (5) with respect to each allowed secured claim provided for by the plan --
>
> (A) the holder of such claim has accepted the plan;
>
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
>
> (C) the debtor surrenders the property securing such claim to such holder . . . . (emphasis added).

[10] Section 1129(b)(2)(A) provides that a plan is "fair and equitable" within the meaning of § 1129(b)(1) as to an impaired class of secured claims if

intended to require the payment of interest when a chapter 13 debtor sought to cure a default on a mortgage under § 1322(b)(5), surely Congress would have expressed that intent directly in the cure provision itself.

In this respect, the case before the Court is virtually identical to Timbers. In Timbers, the undersecured creditor

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the plan provides:

> (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property . . . . (emphasis added).

argued that it was entitled to postpetition interest on its allowed secured claim despite the explicit provision in § 506(b) for postpetition interest for oversecured claims and the absence of comparable language for undersecured claims in § 506(b). In rejecting the undersecured creditor's argument that the obligation to pay postpetition interest was inherent in the concept of adequate protection under § 362(d)(1),[11] this Court observed how easy it would have been for Congress to manifest its intent to require payment of postpetition interest on undersecured claims: "§ 506(b) would simply have said that the secured creditor is entitled to interest 'on his allowed claim, or on the value of the property securing his allowed

[11] 11 U.S.C. § 362(d)(1).

claim, whichever is lesser.'" 484 U.S. at 373, 108 S. Ct. at 631.

Similarly, if Congress had intended to require the payment of interest upon delinquent prepetition installments on a claim being cured under § 1322(b)(5), it could have easily written § 1322(b)(5) as follows:

> notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time, maintenance of payments while the case is pending and payment of interest on all delinquent sums due on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

The absence of such or similar language leads to the inescapable conclusion that Congress did not intend to require the payment of interest to effect a cure of a default under § 1322(b)(5).[12]

[12] In Timbers this Court also evoked "historical principles of bankruptcy" in concluding that the

3. Under another Code "cure" provision, Congress was explicit when it imposed compensation requirements over and above the amount due under the contract to effect a cure.

Another important cure provision of the Code is 11 U.S.C. § 365(b)(1) which involves the cure of defaults and the assumption of executory contracts and unexpired leases. The power of a trustee (or, of course, a debtor-in-possession in a chapter 11 case)[13] to assume an executory contract or unexpired lease is often critical to the debtor's reorganization; a debtor may not be able

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creditor's position was implausible. 484 U.S. at 373. Similarly, the traditional disfavoring of claims for interest on interest, see, e.g., Vanston Bondholders Protection Committee v. Green, 329 U.S. 156 (1946), is instructive in construing the language employed by Congress in § 506(b). This provision calls for interest and "fees, costs or charges," not interest on these items, nor interest on interest.

[13] See 11 U.S.C. § 1107(a).

to operate its business without a real property lease or leased equipment needed for operations.

If a prepetition default exists on an executory contract or unexpired lease, § 365(b)(1) of the Code provides that a trustee, may assume the prepetition executory contract or unexpired lease only if the trustee

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
> (C) provides adequate assurance of future performance under such contract or lease.

(emphasis added).

Unlike § 1325(b)(5), § 365(b)(1) requires not only that a default be "cured," but also that the creditor be compensated for "actual pecuniary loss."

Some courts have construed this additional language, to require that a trustee who assumes an executory contract or unexpired lease pay interest on the delinquent installments as part of the "cure".[14]

At a minimum, the additional statutory language found in § 365(b)(1) but not in § 1322(b)(5), manifests Congress' awareness that a cure of default is conceptually distinct from all of the adverse economic consequences, such as the loss of the time value of money, flowing from a contractual default.[15] If Congress

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[14] In re Hillsborough Holdings Corp., 126 B.R. 895 (Bankr. M.D. Fla. 1991). See also In re University Cafeteria, Inc., 47 B.R. 404 (W.D. Va. 1985).

[15] See also 11 U.S.C. § 1124(2) (providing that a claim is not impaired by a chapter 11 reorganization plan if a prepetition default is cured and the plan "compensates the holder of such claim . . . for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or applicable

intended to require a chapter 13 debtor to pay anything other than the amounts due under the terms of his or her contract to cure a default under § 1322(b)(5), it would have expressed that intent explicitly in § 1322(b)(5).

Since the plain language of § 1322(b)(5) does not contain any support for the "interest on arrears" position, the Court of Appeals had to find this support in the language of some other Code provision. As will now be discussed, these other provisions of the Code, read in light of the overall scheme for treatment of secured claims under chapter 13, fully support the conclusion that Congress intended to give § 1322(b)(5) its commonly understood meaning.

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law").

II. THE OVERALL SCHEME OF CHAPTER 13 REVEALS A CONGRESSIONAL INTENT TO TREAT THE CURING OF DEFAULTS DIFFERENTLY FROM PAYMENT OF A "CLAIM" IN FULL

Section 1322(b) of the Code sets forth the permissible provisions of a chapter 13 plan. Among the permissible provisions of a plan is the curing of a default on a long term obligation under § 1322(b)(5). A separate permissible provision of a plan is the payment in full of certain kinds of secured claims, albeit, in some cases, under terms other than those provided in the original contract between the debtor and creditor. 11 U.S.C. § 1322(b)(2),(8). It is the debtor's choice whether to invoke § 1322(b)(2),(8) or § 1322(b)(5) with respect to a particular secured claim

which is susceptible to treatment under either subsection.[16]

After the debtor has formulated the proposed plan in conformity with § 1322(b), it is § 1325(a) of the Code which then sets forth the statutory requirements which, if met, legally entitle a debtor to confirmation of the chapter 13 plan. Subsection § 1325(a)(5) sets forth the requirements for "providing for" secured claims. What is required is that, in the absence of a creditor's consent, the debtor must either return the collateral or pay over the course of the plan the economic value of the creditor's interest in the collateral, i.e., "the allowed secured claim," as defined by § 506(a). Section 506(b) of the Code establishes the circumstances in which a secured creditor

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[16] E.g., In re Bender, 86 B.R. 809 (Bankr. E.D. Pa. 1988).

may include postpetition interest as a component of its allowed secured claim.

In this case the Tenth Circuit, while recognizing the absence of express language in § 1322(b)(5) which requires the payment of interest on arrears when a debtor proposes to cure a prepetition mortgage default, imported into § 1322(b)(5) the concept from § 506(b) that postpetition interest may be allowed on an oversecured claim. Other courts have reached the same result, by importing the "present value" requirement of § 1325(a)(5) into § 1322(b)(5).[17]

It is possible to treat the payment of interest requirements of § 506(b) and § 1325(a)(5) as a component of a cure effected under § 1322(b)(5) only if the concept of "curing a default" is the exact

[17] E.g., In re Colegrove, 771 F.2d 119 (6th Cir. 1985).

equivalent of "providing for," or paying, an "allowed claim." However, this premise, made by all of the courts which have held that interest must be paid on arrears under § 1322(b)(5), is incorrect. Curing a default and paying a claim are distinct concepts in the adjustment of debtor-creditor relationships under the Code and there is no basis in the text or structure of the Code for treating them interchangeably. Further, the distinction between curing a default and paying a claim is well documented in the Code's legislative history.

A. The Present Value Requirement of § 1325(a)(5)(B), Which Conditions Chapter 13 "Cramdowns", Has No Bearing on the Use of a Plan to Cure a Default While Maintaining Current Payments on a Secured Obligation Which Is Not Being Discharged.

As stated above, § 1325(a)(5) outlines the requirements which must be met for the payment of an allowed secured

claim, in order for the debtor to be entitled to confirmation of a chapter 13 plan. Since creditor consent is not necessary for confirmation, § 1325(a) is often referred to as the chapter 13 "cramdown" provision of the Code.

Just as the text of the chapter 13 cure provision makes no reference to the payment of interest, the language of the chapter 13 cramdown provision makes no reference to the curing of a default. It applies only with respect to distribution in a plan "on account of [an allowed secured] claim."[18]

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[18] If § 1325(a)(5) is not linked to § 1322(b)(5), the question might arise as to how the requirements of maintenance of payments and cure within a reasonable time under § 1322(b)(5) may be enforced. The answer is that, under § 1325(a), a debtor must establish that the proposed plan "complies with the provisions of this chapter and with the other applicable provisions of this title." 11 U.S.C. § 1325(a)(1). Thus, a proposed cure which does not comply with §

This absence of any reference to cure or § 1322(b)(5) in § 1325(a)(5) is most significant in light of the chapter 13 discharge provision, § 1328(a). Under that provision, once a chapter 13 debtor has completed all payments under a confirmed plan, "the court shall grant the debtor a discharge of all debts provided for by the plan, . . . except any debt . . . provided for under section 1322(b)(5) of this title." 11 U.S.C. § 1328(a) (emphasis added).

In other words, secured claims "provided for by the plan" are discharged, while claims simply being cured survive the bankruptcy. Reading this provision together with §§ 1325(a) and 1322(b), any secured claim can be provided for in a plan and discharged, as long as the

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1322(b)(5) would run afoul of § 1325(a)(1).

creditor receives present value. On the other hand, as to a claim being preserved and reinstated in a cure under § 1322(b)(5), the contract remains extant and will survive the bankruptcy. There is no basis for equating the contractual arrearage with the creditor's full "claim" under § 506 solely in order to make the cramdown provision (and the present value requirement contained therein) applicable.

As the Fourth Circuit concluded in Landmark Financial Services, by a panel which included Mr. Justice Powell:

> In a cramdown, the Code requires that the secured creditor receive the present value of his secured claim within the life of the plan. This provision, plus the additional requirement that the creditor retain its lien on the collateral, is the means by which the Code compensates secured creditors for any modifications of their rights. The present value test of § 1325 is designed to factor in the time value of the deferred payments in order to assure full satisfaction of secured claims.

> The cure of a mortgage or other long term debt is a distinct means of treating the claims of some secured creditors. Like a cramdown, it may be imposed on creditors without their consent. It operates, however, in an entirely different manner. Instead of assuring that the creditor receives the full value of his secured claim during the life of the plan, a cure reinstates the original pre-bankruptcy agreement of the parties.

918 F.2d at 1153-54. Accord, Sapos v. Provident Institution of Savings, 967 F.2d 918 (3d Cir. 1992). See also 5 Collier on Bankruptcy ¶1322.09[4] (15th ed. 1992).

B. Section 506(b), As Construed By Ron Pair, Concerns The Evaluation Of A "Claim," Not The Conceptually Distinct Concept Of Arrears On The Claim.

The crux of the Tenth Circuit's position is that Ron Pair "interpreted § 506(b) to require payment of postpetition interest on an oversecured creditor's claim" and that "[o]nly by holding that Congress intended a different result for home mortgages can we escape the

conclusion" that a mortgagee is entitled to interest on an arrearage that is being paid over time. 968 F.2d at 1041. Reading the contrary position from other circuits as assuming "that the mortgagee does not have a 'claim' in the same sense as other secured creditors," 968 F.2d at 1041, the Court referred to the text of § 1322(b)(5) (permitting curing of defaults on "any unsecured claim or secured claim" on which payments will extend beyond the duration of the plan) as evidence that "the Code clearly contemplates that when a mortgagor is in default on payments on a home mortgage the mortgagee has a 'claim' in bankruptcy the same as any other creditor." Id.[19]

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[19] Implicit throughout the opinion of the Court of Appeals is the assumption that secured creditors were intended by Congress to suffer no economic loss whatsoever from the event of bankruptcy. This was also the approach taken by the

The fallacy of this reasoning is its assumption that a "claim" within the meaning of chapter 13 and an arrearage on that claim are one and the same thing. Of course the holder of a mortgage being cured has a "claim" within the meaning of § 506 like that of other creditors. This claim consists of the principal balance and all interest, charges and fees provided for in the mortgage contract, and the claim is a secured claim up to the value of the collateral.[20] Where the creditor has an ample equity cushion in

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Sixth Circuit. See In re Colegrove, 771 F.2d at 119 n.3 ("By allowing the recovery of interest [on arrears] we are merely permitting the creditor to achieve substantially the benefit of its bargain."). This Court has already rejected this generalized approach to statutory construction when interpreting the rights of secured creditors under particular provisions of the Bankruptcy Code. See United Sav. Ass'n v. Timbers of Inwood Forest, 484 U.S. at 379-80.

[20] 11 U.S.C. § 506(a).

the collateral, the "allowed secured claim" will not only include this entire amount, but will also, under § 506(b) and Ron Pair, grow by accretion from the date of filing through the confirmation date. See Landmark Financial Services v. Hall, 918 F.2d at 1155. However, in a plan providing for the cure of a prepetition default, the "claim" is not being paid and, therefore, its valuation is irrelevant to a determination of how much money is needed to cure a default. See Sapos, 967 F.2d at 927-28.[21]

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[21] As the Third Circuit noted in Sapos, mistakenly treating the arrearage as a claim could, in the case of an undersecured creditor, lead to the inequitable result that the arrearage itself could be regarded as undersecured and thereby subject to cramdown. This would reward a debtor who had not kept current in payments before filing for reorganization. 967 F.2d at 927. The Third Circuit was correct in declining to regard the arrearages rather than the payoff figure as the "claim."

That secured claims and arrears on secured claims are distinct concepts under chapter 13 is a principle recognized by the Official Forms which accompany the Bankruptcy Rules of Procedure. Official Form 10 is the required form to be employed by a creditor seeking to file a proof of claim.[22] Creditors are required to state separately the amount of their claim and the amount of any arrearage on the claim. The obvious purpose of this separate statement is to facilitate both possibilities allowed by chapter 13 -- paying the claim itself or merely reinstating the original contractual obligation by curing a default. "The valuation of the claim or the collateral is simply immaterial when the original

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[22] The initial threshold requirement for allowance of a claim is that a proof of claim be filed in the bankruptcy court. 11 U.S.C. § 502(a).

agreement is reinstated and the debtor elects to make all the payments called for by the agreement." Landmark Financial Services v. Hall, 918 F.2d at 1155.

III. THE RELEVANT LEGISLATIVE HISTORY AND POLICY CONSIDERATIONS ALSO SUPPORT PETITIONERS' POSITION.

A. The Legislative History Demonstrates That Congress Intended To Create a Federal Right to Deaccelerate and Cure Home Mortgage Defaults While Leaving It to State Law and the Mortgage Contract to Specify What Sum Must Be Paid in Order To Effectuate a Cure.

The proposition that the cure of a default under § 1322(b)(5) requires the payment of interest on arrears lacks support not only in the text and structure of the Code, but it is belied by the Code's legislative history.

Congress enacted the Bankruptcy Code as the result of legislation passed by both the House and Senate to implement the

recommendations of the Commission on the Bankruptcy Laws of the United States, created by Congress in 1970. With regards to the new chapter 13, the enacted Code by and large adopted both the Commission's criticisms of the existing Chapter XIII and its recommended statutory scheme. See Grubbs v. Houston First American Sav. Ass'n, 730 F.2d 236, 238-39 (5th Cir. 1984) (en banc). See generally H.R. Rep. No. 595, 95th Cong., 1st Sess. 1-3; 118-25 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5963 (hereinafter "House Report").

Section 1322(b) of the Code originated in the initial legislation proposed by the Bankruptcy Commission. See Report of the Bankruptcy Laws Commission, Part II, H.R. Doc. No. 137, 93rd Cong., 1st Sess. 204-06 (1973), reprinted in Appendix 2, Collier on

Bankruptcy (1992) (hereinafter "Commission Report"). It represents the Commission's separate solutions to two separately perceived deficiencies in the prior law.

As to the handling of delinquencies in a debtor's long term mortgage obligation, the Commission noted that the existing statute did not cover mortgage debts at all, but that, nonetheless, bankruptcy courts had often employed their inherent equity powers to specially enjoin foreclosures so as to allow debtors to bring their mortgages current.[23] See Commission Report, Part I, at 165-66. In what ultimately became § 1322(b)(5) of the Code, the Commission recommended codification of this practice so as to enable all chapter 13 debtors, as a matter

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[23] E.g., Hallenback v. Penn Mutual Life Ins. Co., 323 F.2d 566 (4th Cir. 1963).

of right, to be able to cure defaults on long term debt. Commission Report, Part II, at 204-06. See 5 Collier on Bankruptcy ¶ 1322.09[2].

The other perceived problem in existing law regarding the treatment of secured claims addressed by the Commission was the ability of undersecured creditors with a security interest in personal property to exert leverage over debtors disproportionate to the true value of their collateral. See House Report at 124. The Commission's solution to this problem was to allow chapter 13 debtors to alter the size and timing of installment payments owing to all secured creditors, i.e., to "modify" creditors' rights, so long as the payments made through the plan were the economic equivalent of the value of the collateral. See Commission Report, Part II, at 205. This right to modify

ultimately became § 1322(b)(2) of the Code, and the requirement regarding the value of the payment stream being paid on account of such "modified" debt ultimately became the cramdown provision, § 1325(a)(5)(B).

In response to the demands of the residential mortgage industry, Congress chose to insulate claims secured only by a mortgage in the debtor's home from the debtor's power to "modify." 11 U.S.C. § 1322(b)(2). See Grubbs v. Houston First American Sav. Ass'n, 730 F.2d at 242-46. However, Congress left in place the power of a chapter 13 debtor to cure defaults on residential mortgage debt. See Grubbs, 730 F.2d at 242-46; 124 Cong. Rec. H11089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), reprinted in 1978 U.S Code Cong. & Admin. News 6436, 6481; 124 Cong. Rec. S177406 (daily ed. Oct. 6, 1978),

reprinted in 1978 U.S. Code Cong. & Admin. News 6505, 6550.

Having expressly insulated certain mortgage lenders from "modification" and the present value substitute for contractual rights which accompanies modification, Congress gave no indication whatsoever that it intended to graft the present value modification requirement onto the stream of payments required to cure a default. Instead, in the case of mortgage cures, Congress granted debtors the right to enjoin foreclosure, to deaccelerate the obligation and to rectify the default in accordance with the contract provisions, while, over the course of a "reasonable" period of time, maintaining current payments on the obligation. 11 U.S.C. § 1322(b)(5).

In short, in balancing the respective rights of debtors and creditors in chapter

13 cases, Congress chose to permit chapter 13 debtors to satisfy certain secured claims by making payment in full on terms other than those provided in the original contract between the parties, provided that the debtor pay the holder of such a secured claim the present value (i.e., interest) on the claim over the life of the plan.[24] By comparison, in granting chapter 13 debtors the option of curing a default and reinstating a long term obligation, Congress established a different quid pro quo: (1) the debtor must make installment payments on the debt during the life of the plan on the same terms as required by the original contract; (2) the cure of the default must

[24] Secured creditors are also protected, of course, by their right to adequate protection of their interest under 11 U.S.C. § 362(d) and the five-year limitation on the length of chapter 13 plan set by 11 U.S.C. § 1322(c).

be effected within a reasonable time; and (3) the debtor does not receive a discharge of the debt. Because the contract will continue into the future to control the parties relations, it is logical for the contract to control the question of how the cure is to be effectuated.

The two mechanisms for adjusting the relationship of a debtor and a secured creditor under § 1322(b) are so dissimilar that it is impossible to equate the cure of a default with the payment of a claim. Thus, there is no basis to conclude that the requirement that a debtor pay interest when paying a claim should be incorporated into the cure provision of chapter 13.'

B. In Most Cases It Is Unsecured Creditors Who Would Be Harmed If Debtors Are Required to Pay Interest On Arrears To Cure a Default.

11 U.S.C. § 1325(b) requires that in the event of an objection to confirmation of a plan, debtors who cannot pay all their unsecured creditors must instead pay all of their disposable income to unsecured creditors under the plan. "Disposable income" means income which is not reasonably necessary "for the maintenance or support of the debtor or a dependent of the debtor ... ." 11 U.S.C. § 1325(b)(2)(A). If debtors are required to make payments of interest on arrears to cure defaults on secured debts, there will be that much less disposable income available for payments to unsecured creditors.

The Bankruptcy Code creates a delicate balance between the rights of

various creditors and the debtor. A requirement of payment of interest on arrears would undermine that balance by shifting available resources from unsecured to secured creditors.

Similarly, for some debtors with limited disposable income, a requirement of additional payments to secured creditors would undermine their ability to cure defaults and retain property which is subject to the security interest. In the case of home mortgages, which are commonly cured under chapter 13, this means that additional debtors would lose their homes.

CONCLUSION

For all the foregoing reasons, the decision of the Tenth Circuit Court of Appeals in this matter should be reversed in favor of the position taken by the Third, Fourth, Ninth and Eleventh Circuits.

Respectfully Submitted,

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